United States Environmental Protection Agency
Regional Administrator
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

JUL 2 5 2012

Cathy Stepp, Secretary
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Dear Ms. Stepp:

I am pleased to inform you that the U.S. Environmental Protection Agency has approved the *Wisconsin Administrative Code* Chapter NR 217, Subchapter III, "Water Quality Based Effluent Limitations for Phosphorus." This Subchapter, which Wisconsin adopted in 2010, pertains to the development of Wisconsin Pollutant Discharge Elimination System permits to implement the State's approved water quality criteria for phosphorus.

EPA reviewed Subchapter III as a revision to Wisconsin's National Pollutant Discharge Elimination System (NPDES) program and conducted the review under 40 C.F.R. §§ 123.25(a) and 123.62. As Regional Administrator, I have the authority to approve revisions to Wisconsin's NPDES program. An enclosure to this letter explains the basis for approval of the Subchapter.

During its review of Subchapter III, EPA recommended that WDNR and EPA create a new addendum to the NPDES Memorandum of Agreement between our agencies through which WDNR would commit itself to certain conditions as it implements Sections NR 217.14(2) Concentration Based Limits and 217.18 Watershed Adaptive Management Option. The conditions will ensure that permits issued consistent with the Sections also meet the requirements of 40 C.F.R. §§ 122.44, 122.45(d), 122.47, 122.62, 124.8, and 124.56. WDNR signed the addendum in April. Enclosed is a copy of the addendum with both WDNR and EPA's signatures.

Tribal Consultation

EPA consulted with Wisconsin tribes on EPA's review of Subchapter III. The Bad River Band of Lake Superior Tribe of Chippewa Indians (the Bad River Tribe) provided comments to EPA that we want to share with you.

The Bad River Tribe asks whether under Section NR 217.14(1) a mass limit will be included in permits for phosphorus discharges when the receiving water or downstream water is designated as an Exceptional Resource Water (ERW) or Outstanding Resource Water (ORW) by the Tribe. Section NR 217.14(1) states that a mass limit shall be

included in a permit for discharges of phosphorus to receiving or downstream waters that are an ORW or ERW. In a January 19, 2012 letter to WDNR, Wisconsin's Attorney General wrote that in Wisconsin provisions allowing WDNR to establish water quality-based effluent limitations necessary to protect downstream waters, "downstream waters" includes navigable waters of the U.S. that are protected by state and tribal water quality standards. Accordingly, we understand Section NR 217.14(1) to require that mass limits be included in permits for sources that discharge phosphorus into receiving or downstream waters on tribal land that a Tribe has designated as an ORW or ERW. However, we ask that WDNR confirm this in its implementing guidance.

Secondly, the Bad River Tribe asks to be involved in the watershed adaptive management option described in Section NR 217.18 if and when Wisconsin approves this approach for a watershed affecting or having the potential to affect the waters flowing within the boundaries of its Reservation. We ask that WDNR encourage parties developing adaptive management plans to involve tribes during development of such plans if the plans will cover a watershed which affects tribal waters. Although tribes will be able to comment on draft NPDES permits that are based on adaptive management plans under the public notice and comment provisions of Wisconsin Statutes Chapter 283, we encourage you to involve tribes during plan development. The Bad River Tribe also requests that WDNR define the scale of a watershed to which the adaptive management option may apply.

Finally the Bad River Tribe asks that WNDR clarify the method it will use to determine an appropriate "similar location" under Section NR 217.13(2)(d). This provision, which addresses calculation of water quality-based effluent limits, states that "the representative upstream concentration shall be either a concentration derived by the Department based on data from the specific stream or from a similar location." The provision does not explain how WDNR will determine what is an appropriate "similar location" when data are not available from the specific stream. WDNR should be able to clarify the method in its guidance.

Reservation of Rights

EPA reserves the right to initiate a subsequent revision to the Wisconsin program under 40 C.F.R. § 123.62 if, among other things, a Wisconsin court strikes down or limits the State's authority to administer the NPDES program including, but not limited to, the legal authority on which our approval of the present revision is based. Moreover, EPA retains authority to review and object to specific proposed and draft permits in accordance with Section 402(d)(2) of the Clean Water Act, 33 U.S.C. § 1342(d)(2), for any of the grounds set forth in 40 C.F.R. § 123.44(c), even if Wisconsin developed the permit in accordance with State law or our Memorandum of Agreement, including any aspects of State law that EPA has approved as part of Wisconsin's NPDES program. EPA also retains authority to take action as appropriate under 40 C.F.R. §§ 123.63 and 123.64.

Nutrients, including phosphorus, are among the most significant remaining causes of water pollution in Wisconsin and the nation. EPA commends Wisconsin for being the first state in the Region to establish numeric water quality criteria for phosphorus in all of the State's surface waters. We also commend Wisconsin for the significant innovation in the watershed adaptive management section of Subchapter III.

If you have any questions about this approval or the Bad River Tribe's comments, please do not hesitate to contact me at (312) 886-3000.

Sincerely,

Susan Hedman
Regional Administrator

Enclosures

cc: Kenneth Johnson, WDNR